

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

75-1415

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1415

UNITED STATES OF AMERICA,

Appellee,

—v.—

BERNARD SCHIFTER,

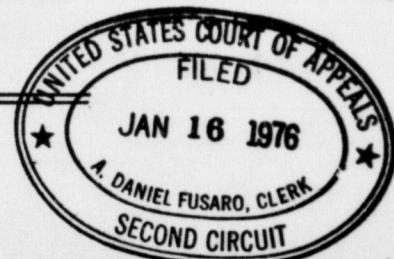
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX FOR APPELLANT

THEODORE ROSENBERG
Attorney for Appellant
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Eastern District of New York*
United States Courthouse
Brooklyn, New York 11201



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

-AGAINST-

BERNARD SCHIFTER,

Defendant.

-----X
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75-1415
C/A Ref No. 7-4459

75-CR-159

75CR 159

DEC 19 1975

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P.M.

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A. DANIEL FUSARO
CLERK, U.S.C.A. 2nd CIR.

S. Kowicki
Asst Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

Plaintiffs,

-against-

BERNARD SCHIFTER,

Defendant.
-----X

25 CR 159

Case No. 75-1415

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Minutes of Suppression/sentence
of December 5th, 1975.

2a

Charles Certfub

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

Plaintiffs,

-against-

Cr. No. 75 CR 159
(T. 18, U.S.C., Sec. 549 & 659)

BERNARD SCHIFTER,

Defendant.

-----x

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 20th day of September 1974, within the Eastern District of New York, the defendant BERNARD SCHIFTER did knowingly, wilfully and unlawfully receive and transport approximately twenty-three (23) Hexanon camera lenses and various quantities of other camera accessories, including, but not limited to, approximately one hundred (100) magnifiers, twenty eight (28) 46 mm Konica camera filters and fifty (50) 67 mm Konica camera filters, all of which lenses and camera accessories had therefofore been unlawfully removed from the American Airlines air cargo warehouse at Building 123, John F. Kennedy International Airport, where they were under the custody and control of the United States Customs Service, the defendant BERNARD SCHIFTER knowing said merchandise to have been unlawfully removed. (Title 18, United States Code, Section 549).

COUNT TWO

On or about the 20th day of September 1974, within the Eastern District of New York, the defendant BERNARD SCHIFTER did knowingly, wilfully and unlawfully have in his possession approximately twenty-three (23) Hexanon camera lenses and various quantities of other camera accessories, including, but not limited to, approximately one hundred (100) magnifiers, twenty-eight (28) 46 mm Konica camera filters and fifty (50) 67 Konica camera filters, having a value in excess of One Hundred Dollars (\$100.00) which goods have been stolen from the American Airlines air cargo warehouse at Building 123, John F. Kennedy International Airport, while moving as and constituting part of a foreign shipment of freight from Japan to Woodside, New York, the defendant BERNARD SCHIFTER knowing the same to have been stolen. (Title 18, United States Code, Section 659).

A TRUE BILL.

Foreman

UNITED STATES ATTORNEY
Eastern District of New York

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK
3

4 -----X

5 UNITED STATES OF AMERICA, :

6 -against- :

7 BERNARD SCHIFTER, :

8 Defendant. :

9 ----- X

75-CR-159

10 United States Courthouse
11 Brooklyn, New York

12 September 4, 1975
13 10:00 o'clock A.M.

14 B e f o r e :

15 HONORABLE THOMAS C. PLATT, U.S.D.J.
16

17 *[Handwritten signature]*
18
19
20
21

22
23 HENRI LEGENDRE
24 ACTING OFFICIAL COURT REPORTER
25

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: GARY WOODFIELD, ESQ.
Assistant U.S. Attorney

THEODORE ROSENBERG, ESQ.
Attorney for Defendant

1 THE CLERK: Criminal Cause on Trial, U.S.A.
2 versus Bernard Schifter.

3 MR. ROSENBERG: Your Honor reserved my motion
4 at the end of the Government's case, and I would
5 like to call Detective Giordano to the stand at this
6 time.

7 THE COURT: All right. Detective Giordano
8 recalled.

9 D E T E C T I V E G I O R D A N O, having previously been
10 duly sworn resumes the witness stand and testifies
11 as follows:

12 REBUTTAL EXAMINATION

13 BY MR. ROSENBERG:

14 Q Detective Giordano, you are still under oath,
15 you are aware of that.

16 A Yes.

17 Q At the time of the arrest, were you handcuffed
18 and was the defendant handcuffed?

19 A Yes.

20 Q And who did that?

21 A I was handcuffed by a New York City detective.

22 Q And who handcuffed the defendant?

23 A I don't know. It could have been a customs
24 agent. I don't remember who handcuffed the defendant.

25 Q But you remember him being handcuffed?

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A Yes, I do.

Q How long were you there with the defendant before you were placed in the car and taken away?

A Oh, maybe about a minute or two.

Q Could it be two or three minutes?

A Within that area.

Q Well, you had testified the day before the trial, did you not?

A Yes.

Q And you swore to tell the truth at the time; is that right?

A Yes.

Q And you did in fact tell the truth?

A Yes.

Q Do you recall me asking you this question, page 90.

"How long after the defendant was handcuffed were you taken away, two minutes, three minutes?

"Answer: Within that, as soon as they came in, say two minutes I was handcuffed and put into another car."

Did you make that statement?

A Yes.

Q So you would say approximately two minutes?

A Approximately two minutes.

1
2 Q Give or take. During those two minutes, did
3 you hear anybody advise the defendant of his rights?

4 A Not in front of me; no.

5 Q And during those two minutes, did you hear the
6 defendant state that the \$1,000 was for gas money?

7 A No.

8 Q Now, as I understand it, you were taped up and
9 the recording was going on in another car; is that correct?

10 A Yes, sir.

11 Q And aside from the recording working, there was
12 also detectives in that car who could listen to what was
13 taking place; is that right?

14 A Yes.

15 Q So it would be a recording plus other people
16 who are listening to that recording; is that right?

17 A Right.

18 Q To the best of your knowledge, when was that
19 recording shut off?

20 A I couldn't honestly tell you. I had no control
21 of shutting off the tape.

22 Q I'm aware of that, but was it shut off some-
23 where on the way back to the customs house?

24 A It could have been. I couldn't give you an
25 honest answer.

Q Do you recall testifying once again the day

1
2 before we started the trial, page 94, and me asking you this
3 question and you giving this answer.

4 "Question: So that do you know when that recording
5 was shut off?

6 "Answer: I think it was shut off. I think it was
7 shut off when we went back to the customs area. I can't
8 recall but it wasn't shut off right away."

9 Do you recall me asking you those questions and you
10 giving that answer?

11 A Yes.

12 Q That's a truthful answer?

13 A Yes.

14 Q After the defendant was arrested and arraigned,
15 did you have occasion to call him up?

16 A Yes, I did.

17 Q And did you at that time ask him for the \$1,000
18 back that you gave him when you bought this merchandise?

19 A No.

20 Q Well, the purpose of your calling him up was to
21 continue your relationship with him, was it not?

22 A Right.

23 Q Because at that time, to the best of your
24 knowledge, he was not aware that you were acting in an under-
25 cover capacity; is that correct?

Giordano-rebuttal/Rosenberg

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A Yes.

Q And you wanted to see whether or not you could get any kind of admission from him?

A I was trying to recover the cameras if I possibly could.

Q You wanted to know if he was involved -- make an admission -- wasn't your lead -- well where is the \$1,000 -- do you recall something like that?

A Yes.

Q Getting back to the day of the arrest, these officers were supposed to move in on a prearranged signal?

A That's correct.

Q And that prearranged signal was after the transaction was consummated; is that correct?

A Yes.

Q How many agents were involved?

A Like I stated to you before I couldn't recall offhand how many there were. There could have been between New York Customs and ours -- between 6 and 8, because there were a couple of cars involved in it.

Q How many cars?

A My car. I think there were two City cars and three Customs cars, I'm not positive on the amount of cars but within that area.

Giordano-rebuttal/Rosenberg

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Q And after the transaction was consummated and that was your signal, all cars converged on the gas station; is that correct?

A Yes.

Q How many cars converged?

A I saw three cars come in, that's all I saw.

Q And did you see Thornton?

A Yes.

Q Which car did he get out of?

A He got out of the Customs car.

Q How many other agents got out of the car with you?

A I don't recall.

Q But you know definitely he got out of the car and there were other agents who got out of the car?

A There is no doubt in my mind.

Q How about Maxwell, did you see which car he got out of?

A No.

Q Did you see him come over there?

A He was by the car. I seen him there but I couldn't say which car he came out of.

Q But you know that all the cars converged?

A Yes.

Giordano-rebuttal/Rosenberg

1
2 Q And Maxwell was in the car?

3 A He was in the one car. I don't know which car.

4 Q He wasn't strolling into the gas station,
5 he came with a car?

6 A Yes.

7 Q And Thornton came with a car; is that correct?

8 A Yes.

9 Q He didn't stroll in either?

10 A No.

11 MR. ROSENBERG: Thank you, no further questions.

12 CROSS-EXAMINATION

13 BY MR. WOODFIELD:

14 Q It's your testimony that there was 6 to 8 people
15 present in the gas station at the time of the arrest; is that
16 correct?

17 A Yes.

18 Q And there were a few cars there; is that correct?

19 A Yes.

20 Q And was everyone doing a different job at that
21 time, doing various things, seizing exhibits, arresting people?

22 A Yes.

23 Q Now, Detective, Mr. Rosenberg asked you questions
24 concerning a telephone call or contact you had with the
25 defendant after he was arraigned going back to the time that

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you were arrested. Did you have any further conversation with the defendant concerning that \$1,000?

A Yes, sir.

Q Could you please relate to the jury what that was?

A At the Customs Office we both were in the same room together sitting next to the window talking, and he turned around and said to me, "Don't say you gave me the money. I told them it was my gas money."

MR. WOODFIELD: Thank you.

MR. ROSENBERG: No questions. Defense rests.

THE COURT: Ladies and gentlemen, we'll take a short recess. We have one or two legal matters to discuss, then we'll call you back. Don't discuss the case.

(Whereupon, the jurors were excused from the courtroom.)

MR. ROSENBERG: At the end of the entire case --

THE COURT: Make your motion as if it's made at the end of the Government's case.

MR. ROSENBERG: The defendant respectfully moves to dismiss on the ground the People have failed to establish a prima facie case. I have no argument.

THE COURT: Motion is denied.

1 MR. ROSENBERG: Defendant rests.

2 MR. WOODFIELD: Government rests.

3 MR. ROSENBERG: On the entire case, the de-
4 fendant respectfully moves to dismiss on the ground
5 the Government has failed to prove the guilt of the
6 defendant beyond a reasonable doubt.

7 I respectfully submit that there isn't any
8 evidence in this case which would indicate that the
9 defendant had knowledge of the fact that he was
10 working in stolen merchandise prior to the time he
11 sold it. I think the Government is relying on what
12 statements were made subsequent to infer guilty
13 knowledge. I think that can be checked off or credited
14 to, or whatever to the fact that the defendant was
15 perhaps acting at the inspiration of the moment, but
16 no way can these two statements which the Government
17 relies on impute or infer guilty knowledge, accordingly,
18 I'll ask the Court to dismiss the indictment.

19 THE COURT: Let's just take one item which I
20 made a rough calculation of. If 21 boxes of lenses
21 cost 1300 to produce, they cost \$62 apiece, and the
22 offer was to sell them here at 35 or \$40 apiece; from
23 that alone, a jury -- and the retail price was double
24 that, so that's \$124, so that alone the jury could infer
25 knowledge, could they not?

1 MR. ROSENBERG: Your Honor, I don't think
2 the Government established how many of these boxes
3 would go into a particular carton. I don't think that
4 was established.

5 THE COURT: I think the inference that this box
6 had 21 --

7 MR. ROSENBERG: But there was an area respective
8 of what the value might have been, and I don't know
9 whether or not it was proven; irrespective of that
10 it appears to be some evidence to the effect that these
11 were slow-moving and that even at the price which was
12 offered there were no takers.

13 THE COURT: But the retail, that's enough --
14 but the retail and the price of these lenses was about
15 \$124 apiece, according to the evidence, and they are
16 being offered -- 35 to 40. Putting everything else
17 aside that is pretty damaging, but the rest of it is
18 overwhelming.

19 MR. ROSENBERG: I'm ready for my summation.

20 THE COURT: Motion denied.

21 MR. WOODFIELD: Can we have a ruling with re-
22 gard to the charges.

23 THE COURT: Well, I'll tell you. Take the
24 defendant's request to charge. I've got it in other
25 words but not in those words, number one. I'll give

1 number two, in other words; three, I won't give.

2 There weren't any other witnesses really. Four --

3 I've already instructed them on that the beginning of
4 the trial. Four is embodied in reasonable doubt
5 instructions.

6 Five I will give; six, I have it in different
7 words but you'll get that.

8 One I'll comment on the evidence which I do not
9 propose to give as such, but there is a general
10 instruction that I give to such effect, but I will not
11 comment to that effect on the evidence.

12 Two, I have a recently possession instruction,
13 which is different, not in words but in substance,
14 it's essentially the same; and three, the same difference
15 in substance but I do give a conscious clause, can't
16 avoid a no conscience clause.

17 Shall I bring them in?

18 MR. ROSENBERG: Yes.

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20 (Continued next page.)
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1 (Whereupon jury reentered the courtroom and
2 are now seated in the jury box.)

3 THE COURT: Now, ladies and gentlemen of the
4 jury, we are at the stage of the trial where we have
5 summations by the attorney for either side in which
6 they give you their view of the evidence as they see
7 it.

8 Now, you will recall at the outset of the trial
9 I cautioned you that the statements of counsel are not
10 evidence, and I recaution you now again that the
11 statements of counsel, either defense counsel or the
12 prosecutor, are not evidence. The evidence is what
13 you have heard from the witness stand and what's
14 been marked into evidence as exhibits. With that
15 caution, you may proceed.

16 MR. ROSENBERG: If your Honor please,
17 Mr. U.S. Attorney, Mr. Foreman, ladies and gentlemen
18 of the jury.

19 At the outset I wish to thank you all for the
20 patience and the time that you have given us. Now,
21 we come to the end of the case when I get through
22 summing up the U.S. Attorney sums up, and after that
23 I cannot come up and retry, and I'm telling you that
24 now in case you should speculate why I don't answer,
25 because under the law I cannot.

Summation-Rosenberg

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3 Now, as you can see that puts the defense in
4 a little bit of a difficult situation. I can only
5 anticipate what argument he's going to give, while
6 he's in a position to answer each and every argument
7 that I put forward, and I suppose the reason for that
8 is that he has the burden of proving the defendant's
9 guilt beyond a reasonable doubt. However, it then
10 will become your responsibility to analyze, scrutinize,
11 discuss the arguments that we put forth consistent
12 with innocence, and that is mandated, and that if his
13 Honor will instruct you is the law of the state of
14 New York and the United States Government.

15 As this defendant sits here right now, he's
16 presumed to be innocent. He's presumed innocent
17 throughout our summations. He's presumed innocent
18 throughout the judge's charge to you, and that
19 presumption of innocence is taken with you to the
20 jury room, and that's the way you weigh the evidence
21 as against the presumption of innocence. If you have
22 any fact which has two inferences, one of guilt, one
23 of innocence, you are mandated, you are commanded to
24 accept the one of innocence. These laws, presumption
25 of innocence, reasonable doubt, is not made for this
defendant alone, it's made for everyone that comes

Summation-Rosenberg

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2 into this courtroom and sits at that table and says,
3 I'm innocent, give me justice. These safeguards,
4 these constitutional safeguards goes beyond the guilt
5 or innocence of any one defendant. It's a standard
6 that exists, and that's what you swore to this
7 defendant that you would uphold, and I'm certain that
8 when your time comes that this is what you'll do.

9 The moment one juror, one juror accepts less
10 than what is required, I tell you that's the beginning
11 and the end of a democratic system, and that's the
12 greatest injustice that we could perpetrate upon a
13 fellow human being.

14 Now, let's get into the facts of the case,
15 the issue I believe is a simple issue. There is no
16 doubt that the defendant was in possession of stolen
17 merchandise. There is no doubt that the defendant
18 sold stolen merchandise to an undercover agent, but
19 the issue is, did he in fact know that it was stolen
20 at the time he consummated the deal. That's the only
21 issue, as far as I can see, and I think that the
22 Government will rely upon perhaps two statements to
23 prove this consciousness of guilt; the thousand
24 dollars as gas money and "my bones will be laying all
25 over the airport." I believe this is what the U.S.

Summation-Rosenberg

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2 Attorney is going to rely upon in order to show that
3 the defendant had guilty knowledge. I tell you now
4 that I think you can infer from the testimony, as you
5 have heard it, that these statements were never made;
6 even if they were, and I'll get to that later, but
7 I tell you right now, I think that you can infer that
8 these statements were never made. Why? To begin
9 with and most important, they would have you believe
10 that this shows some kind of an admission, some kind
11 of consciousness of guilt, and yet, neither Thornton,
12 Maxwell put it in their report. If you recall Maxwell
13 told us that a criminal report that he gives it to a
14 U.S. Attorney, he gives him all the surrounding
15 circumstances of the case. All right. It would
16 appear to me that if you have a defendant in possession
17 of stolen merchandise, and you have a confession by
18 the defendant or something which shows consciousness
19 of guilt, you put a little bow tie around this case,
20 here Mr. U.S. Attorney, we found him with the hot
21 stuff and he admitted to it. You have a simple
22 situation, go on to next case, fight, but these reports,
23 these reports which they want you now to believe
24 shows the consciousness of guilt, these reports which
25 they say amounts to a confession, these statements

Summation-Rosenberg

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2 which amounts to a confession, according to their
3 interpretation wasn't even put in the report, and the
4 first time we hear about it is when Thornton states
5 something to that effect in the grand jury. I believe
6 by the fact that it was not in the report you can
7 infer either they didn't attach too much importance
8 to it, if in fact it was said, or the defendant never
9 made the statement.

10 Now, Maxwell indicated that this statement
11 about gas money was made almost immediately after he
12 came on to the station, that was his testimony; and
13 incidentally, if there is an area of doubt with what
14 I say the testimony is, and what you think it is,
15 it's your recollection that governs. You have a right,
16 if there is a sincere area to call for the minutes and
17 the minutes will be read back to you.

18 Now, Maxwell said it happened almost immediately,
19 all right. I'll tell you why it couldn't have
20 happened. If it happened almost immediately, Giodano
21 was there, he would have testified to that. He said,
22 according to his statements it was at least two or
23 three minutes before he was taken away, so Giodano
24 would have heard it if it had been said there. It
25 would have been on the tape recorder, whether poor or

1
2 otherwise, it would have been there if that statement
3 was in fact made. And further, the officers stationed
4 in the car who would be listening to this wice on
5 Giordano, they would hear it; no officer was produced.
6 The tape -- one of those unfortunate things, it didn't
7 come out, and Giordano said he never heard the
8 statement made.

9 Maxwell stated that the defendant allegedly
10 made some kind of admission, "If I knew it was a
11 Federal crime I never would have participated in it."
12 He alleged that that statement took place back in the
13 Customs House, or some house 80, something like that;
14 and I asked about Thornton, he said, well, Thornton
15 was there, he wasn't there. He did hear it, he didn't
16 hear it. Page 220 on the bottom: "We then went to
17 the Customs office where Agent Swinton conducted an
18 interview of Mr. Schifter. Again Mr. Schifter was
19 asked various questions pertaining to the merchandise
20 and who gave him the merchandise and he was told that
21 this merchandise was stolen from the Customs custody
22 and was part of an interstate shipment. Mr. Schifter
23 just turned and stated, "If I knew this shipment was
24 Federal and came from interstate I never would have
25 touched it."

Summation-Rosenberg

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2 Now, Maxwell is telling us at this time that
3 Thornton was interviewing him and he was eliciting this
4 from Thornton. Later on -- page 222 -- now, when
5 Agent Thornton who then was the case agent interviewed
6 the defendant, he allegedly said, if I knew it was
7 Federally stolen, he said that to me -- that's where
8 Maxwell interrupted and said that was his answer, he
9 said that to me, Maxwell. Thornton he said was
10 interviewing him and now he says that he's making the
11 admission to him, Maxwell.

12 "Question: He said it to you in the presence
13 of Agent Thornton?

14 "Answer: I don't recall if Agent Thornton was
15 in the room when he said it."

16 First he has you believe that Agent Thornton
17 is making the interview, that he makes this admission
18 to Agent Thornton, and later on -- because Agent
19 Thornton didn't corroborate that -- and later on in
20 his testimony I asked him, he made that admission to
21 Agent Thornton, he said no, he made it to me. He had
22 us believing originally that Agent Thornton was
23 conducting the interview. The examination was made,
24 the interview was with him and he changed it around
25 that it was made to Agent Maxwell, but Thornton wasn't

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2 there. Why? Because when I asked Agent Thornton
3 about the admission that he said he made, Agent
4 Thornton told us the defendant at the Customs or
5 House 80, whatever it may have been, he still
6 maintained his innocence, he still maintained his
7 innocence. He still said, "I did not know it was
8 stolen," so he says one thing one time when
9 Agent Thornton can't back him up. Defendant still
10 said -- the defendant still maintained he didn't know
11 it was stolen. Then he changed the testimony.

12 I'll tell you what let's do, let's assume these
13 two statements which they say shows guilty knowledge,
14 let's assume -- we'll take the most favorable view of
15 the Government. Let's assume it was made. The
16 defendant is arrested, he's handcuffed at his own
17 gas station, a middle-aged man and a businessman in
18 this community, he's handcuffed, agents come in and
19 empties his pockets, what's the money for? Now, he
20 knows. For the first time he's involved in a swindle.
21 I'll show you the way his conduct was prior to that.
22 The first time he knows it's a swindle and he blurts
23 our gas money. We want to sit here, cool, calm,
24 collected, unemotional and judge what a man should say
25 under those kind of circumstances and those kind of

Summation-Rosenberg

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2 conditions. He should have said, I just purchased it
3 or I just made a sale. He should have said at that
4 point -- an intelligent man is triggered -- any
5 question about the money, he just made a sale, and now
6 for the first time he recognizes that he's in trouble.
7 Heretofore he believed he was innocent or he believed
8 he was involved in an innocent transaction. I'll tell
9 you why I believe that he felt that way. Remember
10 Sufo (phonetic)? Not my witness, the Government's
11 witness. When he negotiated with Sufo, Sufo says to
12 him, take a check -- I'll take a check. Give me a
13 bill, sure I'll give you a bill. Anybody dealing with
14 stolen merchandise, no bill, no merchandise, give me
15 the cash, put a check into my checking account,
16 documentary proof, involvement in a crime; not only
17 a check, I'll give you a bill. Why can't he
18 communicate this to him. He doesn't feel he's
19 involved in stolen property.

20 Page 155, the question by the U.S. Attorney,
21 Sufo replied again at the time, "I told him about a
22 bill and about paying by check and he said, 'No
23 problem.'" This is what their witness testified to.
24 "No problem."

25 Page 157. "At the time I spoke to him I asked

Summation-Rosenberg

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2 him whether it was legitimate and I believe at the
3 time he also believed it was legitimate." No problem,
4 and he said the guarantee would be mailed to the
5 company. This shnook bought merchandise believing
6 in good --

7 MR. WOODFIELD: Objection. There is no proof
8 to show that this individual bought merchandise.

9 THE COURT: There is no evidence.

10 MR. ROSENBERG: This gentleman here has
11 merchandise believing in good faith that he's selling,
12 that he got a bargain, that he's passing on a bargain,
13 he could make a profit. "I'll take your check, I'll
14 give you a bill. He's not worried." Why isn't he
15 worried, because at the time he negotiated he did not
16 believe he was committing a crime, and as for the other
17 statement, "My bones will be all over the airport,"
18 this shows consciousness of guilt, this shows he was
19 guilty, he knew all the time. Remember when that
20 statement, if believed, if you want to say it, I'm
21 taking the best view of the Government. Assuming he
22 said it, and I don't concede it, but assuming he said
23 it, he already knew the merchandise was stolen. He
24 already knew he was in trouble. People who steal
25 merchandise from an airport are rough and tumble

Summation-Rosenberg

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2 people. You're not dealing with anybody that you could
3 be careless about. He's in possession of this kind of
4 merchandise, he knows it's stolen now for the first
5 time. Tell us who sold it to you. No, he's not a
6 hero. He's a middle-aged businessman; so at this
7 point when he knows now he's in a swindle, when he
8 felt he was dealing in good faith, when he was dealing
9 with Sufo for the first time recognizing he's in a
10 swindle he says perhaps if I were to do this deal
11 with these kind of violent people "my bones would be
12 over the airport," but it absolutely does not mean
13 that at the time he sold the merchandise he knew it
14 was stolen, and you certainly cannot infer from that.

15 With respect to the defendant not taking the
16 stand. I tell you now, I think his Honor will
17 instruct you as a matter of law, that no unfavorable
18 inferences can be drawn. I tell you this, that in
19 every criminal case when it comes down to it, this
20 becomes my decision and my decision alone. It may
21 very well be some juror would like to hear the
22 defendnat get on the witness stand and say I'm not
23 guilty, but I'll tell you that was done already,
24 this defendant said he's not guilty, whether he
25 says it from there, he says it from here, he says

Summation-Rosenberg

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2 he's not guilty; and if you cannot take that instruction
3 from his Honor when he gives it to you that no
4 unfavorable inference cannot be drawn, you cannot in
5 good conscience follow the Court's instruction, you
6 come back and tell us you cannot do it and we'll
7 start a new trial.

8 Ladies and gentlemen, there is some evidence
9 in this case, I suppose, but some evidence is
10 insufficient and insufficient evidence is not enough
11 to convict the defendant beyond a reasonable doubt.
12 You cannot say, maybe he's guilty; you cannot say
13 he's almost certainly guilty; you cannot say he's
14 probably guilty, unless you can say without equivoca-
15 tion, without a reserve that this defendant is
16 guilty by clear and convincing testimony, by over-
17 whelming testimony, that leaves no other doubt but
18 his guilt beyond a reasonable doubt; unless you can
19 say that, it's your sworn duty to acquit this
20 defendant.

21 (continued next page)
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Summation-Rosenberg

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2 MR. ROSENBERG (continuing): If your mind is
3 wavering and you have a doubt, please stand on your
4 feet in that jury room, don't bargain away his life;
5 don't take away his liberty. You know it's a
6 responsibility that an attorney feels when he walks
7 into a courtroom and sometimes you forget things, if
8 I've forgotten things in this case, it's not unusual,
9 you forget in every case, but that's what you are
10 here for, because I omitted something doesn't
11 necessarily mean that I didn't feel that it was
12 important, it's because I'm human and I forget, but
13 you have a job. I did my job, the U.S. Attorney did
14 his, the agents did their and most assuredly, your
15 Honor did his; it's now your responsibility, I tell
16 you, there can be only one verdict from the lack of
17 evidence in this case and that is not guilty.

18 MR. WOODFIELD: May it please the Court, your
19 Honor, defense counsel, ladies and gentlemen of the
20 jury:

21 Sitting here listening to Mr. Rosenberg's
22 summation, I could sum it up in a nutshell, don't
23 believe the Government witnesses; don't believe the
24 testimony of Detective Joseph Giordano; don't believe
25 the testimony of Mark Thornton; don't believe the

Summation-Woodfield

testimony of Thomas Maxwell, they all lied to you when they told you testimony concerning the statements made in this case. And just briefly, let's -- the basis, of course, that Mr. Rosenberg relies on is when he tells you these individuals lied, it is really twofold; the first that they stated things on the stand that weren't included in their report and the second is he pointed out certain inconsistencies in their testimony and therefore that's a basis for you not to believe these individuals. Let's deal with these just briefly.

With regard to the second point, the inconsistencies. You sat here at my opening, it was a short trial. It involved one day's testimony. I'm not going to sit here and pick out various aspects of the transcript, that's not necessary. You heard everything in one day and I think you should have a grasp of the case and the facts in this case. You heard the testimony of those various agents; you in your own mind decide what is important, what is not important in this case. You put yourself in those witnesses' shoes, try to put yourself at the scene and try to judge what is important, what is not important, what would you remember a year later,

Summation-Woodfield

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2 what you would not remember a year later; what is
3 important to an agent when he makes an arrest, what
4 is not important and what will you remember when you
5 have to testify concerning that a year later.

6 Now, what is not important in this case is who
7 was standing where when the arrest was made; who came
8 in what car with whom; how long they stood there. We
9 are talking of minutes, seconds, two minutes have
10 been thrown around the term immediately. These are
11 nebulous terms, nebulous times that have been spread
12 over a period of a year. You just use your common
13 sense.

14 Mr. Rosenberg stated in this courtroom that
15 we are bound by certain laws and regulations, how-
16 ever, we are dealing with a real live event, an
17 event which occurred a year ago, and you heard
18 testimony concerning those events; you, from
19 listening to that testimony, attempt to put it
20 together and determine what happened, and I submit
21 to you that from the testimony of those witnesses
22 you got an accurate picture of the events that
23 occurred.

24 Now, with regard to the second point, and
25 that is these witnesses are not telling you the

Summation-Woodfield

4 2 truth. The Government witnesses are not telling you
3 the truth. Let me make a few observations on that.
4 Initially, if you do believe Detective Giordano, if
5 you do believe Maxwell, if you do believe Thornton
6 lied to you, by all means acquit the defendant in
7 this case. If you feel those witnesses got up here
8 on the stand and told you a pack of lies, by all
9 means acquit, but then please, as I stated before,
10 this entire case involves the use of your common
11 sense. People just don't lie for the sake of lying,
12 they lie when it's to their best advantage, such as
13 when someone is arrested with one thousand dollars in
14 their pocket, gas money. That's a lie to his
15 advantage or at least the defendant thought so at
16 the time. Why are those witnesses going to get on
17 the stand and lie, those three witnesses, the ones
18 that Mr. Rosenberg states to you are crucial. I'm
19 not going to make that representation. I want you to
20 view all the evidence as a whole, Mr. Rosenberg
21 stated those three Government witnesses were the
22 crucial witnesses; those are the ones that lied to
23 you. What motive did they have to lie? I believe
24 Detective Giordano told you he has been employed for
25 nineteen and a half years; the other individual

Summation-Woodfield

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2 stated that he had been employed numerous years in
3 their Government positions; why get on the stand and
4 lie to you, face loss of their jobs, face the scorn
5 of their fellow employees, perjure themselves before
6 his Honor. What advantage do they have by lying?
7 Are they going to take that risk? Are they going to
8 gamble? What do they have to gain by lying? I
9 believe Agent Maxwell said this is one of forty or
10 fifty cases he has. Is he going to lie in forty,
11 fifty of his cases. This is one of many cases that
12 he has.

13 I submit to you that they got on that stand
14 and told you the truth and told you their best
15 recollection of the events that occurred a year ago.
16 If they were going to lie, look at it the other way,
17 they got on the stand, they agreed ahead of time,
18 get on the stand and lie. I would have hoped they
19 would have given me a better lie. I would have hoped
20 they could get up there and say the defendant knew
21 who stood where and when, but think of it that way,
22 is that what Mr. Rosenberg wants? Would you believe
23 that? Would you believe those witnesses if they got
24 on that stand and said I stood by Agent Thornton for
25 thirty-seven seconds, moved three feet to the left,

Summation-Woodfield

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2 got in the car with Maxwell, Gregory and Smith and
3 proceeded to the airport where we arrived seventeen
4 minutes later. Testimony like that is beyond belief,
5 and I think you could sit here laughing if you heard
6 testimony along those lines. If you attempt to
7 recall back to an event of importance in your life --
8 a case does have some importance, they have to
9 remember facts, and I believe they do remember facts.
10 You'll remember events that occurred, you're not
11 going to remember the small details, the movement of
12 people at what I think you could state was somewhat
13 of a hectic time, when six or eight people are moving
14 in, no one knew what to expect. They didn't know
15 whether or not other people were involved. The
16 Government had no contact with this individual
17 before. They didn't know what to expect; various
18 cars, New York City police, Customs. You have to
19 consider things and use your common sense as to what
20 occurred.

21 Now, I'm not going to deal with that subject
22 any longer. I'm not going to deal with it any longer
23 because I believe that Mr. Rosenberg would like me to
24 deal with that for a long period of time, but I
25 don't think that's the issue in the case as stated

Summation-Woodfield

1 in my opening. The issue in this case is the
2 question of knowledge, and it is in all these cases,
3 because as Mr. Rosenberg stated to you, it's not a
4 real issue that these goods were stolen, it's not a
5 real issue that he was in possession of these goods
6 and sold these goods. The issue is knowledge, but
7 just to digress for a second. Let's put ourselves
8 in Mr. Rosenberg's shoes, what would you do if you
9 were representing Mr. Schifter in the case, would
10 you contest the fact that he sold camera goods to
11 an undercover agent? Would you contest the fact
12 that he had various goods in his possession? Would
13 you contest the fact that those goods were stolen
14 when you saw documentary and heard testimony to that
15 effect? Would that be a tactic as defense counsel?
16 I submit to you you would take the tactic that
17 Mr. Rosenberg is taking, the defendant didn't know
18 these goods were stolen, and that's what I told you
19 in my opening, and I told you that because to grasp
20 that concept is different from grasping the other
21 concept -- all testimony comes forward and you could
22 listen to it. When you could put your hand on a
23 camera lens or a photograph watching a transaction
24 in process -- but when you have to deal with a
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Summation-Woodfield

8 2 somewhat nebulous context of knowledge, what's in
3 someone's mind, that's more difficult. That's what
4 I wanted to point out to you in the beginning of the
5 case, in my opening, and that's why I want to review
6 it with you now. It takes a little more time to
7 prove knowledge. It takes some thought and some
8 exercise on your part, and that's the jury's function.
9 So what isn't at issue here is that these goods were
10 stolen from the airport. They were traveling in
11 foreign commerce, they were stored at American Air-
12 lines, they had it cleared through Customs and they
13 were stolen sometime last August. It's not an issue
14 on September 19 the defendant attempted to sell some
15 of these goods through Mr. Sufo (phonetic); it's not
16 an issue on September 20th the defendant sold over
17 five thousand dollars worth of these goods to an
18 undercover officer for one thousand dollars. There
19 was no bill of sale, no guarantee involved. This
20 transaction took place in the defendant's trunk or
21 rear end of his station wagon at his gas station in
22 Brooklyn. At the time the defendant stated to
23 Detective Giordano that he had access of four hundred
24 cameras, would he be interested. That's an
25 interesting figure, four hundred cameras. If you

Summation-Woodfield

remember the testimony of Peter -- look at the documents or recall his testimony, it was short; his testimony indicated how many cameras was involved in that theft, how many were in that shipment, four hundred. If there were more cameras involved in the shipment, how many cameras were stolen, four hundred cameras, nineteen cartons, stolen. In all seventeen cartons of cameras, four hundred cameras, one carton of lenses that we have here; one carton of accessories that we have. So it's interesting to note that the defendant stated to the detective that he had access to the rest of the entire load of the stolen goods. Further, after the arrest, the defendant made various statements. He stated that the thousand dollars was gas money, and he said this on a couple of occasions. Later on he stated he didn't know the goods were stolen. First he said if he knew it was Federal offense he wouldn't have touched the stuff. Further on he stated if I cooperate my bones would be all over the airport. Briefly that's the substance of the case. Now, it's your job, as I stated to you before, to weigh the evidence, to view the defendant's actions, to view the defendant's statement, to make a determination

Summation-Woodfield

whether or not he knew these goods were stolen. Before I go through these in a more detailed explanation, I want you to just again sit back and use your common sense, what has occurred here? Again we are in a courtroom that may not be a slice of real life, but we are talking about events that occurred, real live events. Take one step back what happened in this case. What is a man doing who owns a gas station in Brooklyn selling camera lenses, total value of more than five thousand dollars, he's selling it for a fifth of their value, out of a trunk of his station wagon at the gas station. Are those the actions of a man who doesn't know the goods are stolen? Just use your common sense. Here is a defendant, his possession of lenses stolen in the airport. The man runs a gas station, he has these goods, they are in their original container. We don't know where he got them. He has no idea how he's going to sell them. He calls a friend of his who visits this gas station and says, "Hey, can you move these goods and of course in that conversation, as you have heard, and as Mr. Rosenberg has banged across to you in a rather loud manner, and that is he had the bill of sales. He wasn't concerned about

Summation-Woodfield

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2 it, he had the guarantee. Take a check, no problem.
3 Well, talk is cheap. What happened? The sale was
4 in cash. There is no bill of sale, there is no
5 receipt, there is no guarantee. Did the money go in
6 a cash register? Was there a receipt given? The
7 money went in his pocket. Sell the defendant in
8 possession of these camera lenses totaled more than
9 five thousand dollars, sells them to an individual
10 he never met before, sells them for a thousand dollars,
11 no questions asked, puts the money in his pocket,
12 sells them for a fifth of their value. Just on that
13 fact alone, if you thought, or if the defendant
14 thought this was legitimate merchandise, would he
15 have sold it for one-fifth of its value.

16 The vice-president of Konica Cameras says he
17 gets them for half value. Here's a man in the
18 business, makes money selling cameras, and he sells
19 them for fifty per cent markup. If the defendant
20 knew anything about these goods, if he thought that
21 they were legitimate goods, would he have sold them
22 for one-fifth of the value. The man who receives
23 these goods and sells them all the time sells them
24 for half of their value; and again there is no bill
25 of sale, there is no receipt.

Summation-Woodfield

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2 A further statement that I want to get across
3 to you again, it didn't occur like Mr. Rosenberg says
4 it to you, it didn't take place after they were
5 arrested, this was a statement that was made while
6 the transaction was taking place and that is, "Are
7 you interested in four hundred cameras?" That was the
8 statement that was made that's in the transcript, you
9 recall it I'm sure. The defendant told
10 Detective Giordano, "Are you interested in four
11 hundred cameras?" There we have the defendant with
12 access to that entire load of stolen goods, four
13 hundred cameras, a box of lenses, a box of accessories.
14 He has them all at his disposal, and he stated --
15 what did he state? I asked a question, I believe I
16 asked it first of Detective Giordano, did he say I
17 have four hundred cameras or we have four hundred
18 cameras, and if you recall, Detective Giordano said,
19 "We have four hundred cameras." That's the first
20 and last time we heard anything about the defendant's
21 ability to get these cameras and from whom. Those
22 basically are the defendant's actions in this case.
23 Are those actions of an innocent man, or are those
24 actions of one who knew these goods were stolen.
25 Please, use your common sense.

Summation-Woodfield

Before I go into the various statements that were made, Mr. Rosenberg stated right at the end of his summation, the liberty of this defendant is at stake and it's at your hands. I submit to you that that's not a function of the jury, and that's not for your consideration. Your job is to evaluate and weigh the evidence as it comes before you, and determine whether or not this defendant is guilty of the crime charged. Don't consider things as your personal prejudices that you may have, or any sympathy, other factors; Judge Platt will give you similar instructions when he gives you instructions after I am done. I want to get that across to you, it's not your job to sentence this defendant. You are merely to determine whether or not this defendant committed the crime. If any sentence is going to be imposed, the Judge can do that, he considers many other factors that aren't before you. I don't want you to consider that. You took an oath when you were sworn in and that was to be fair, to be fair to both sides and that's the oath you swore to, and I expect you to uphold that oath.

Now, I've reviewed briefly the defendant's actions in determining whether or not he had

Surmation-Woodfield

knowledge that these goods were stolen. I would like to now go through the various statements that were made and see what light they shed on this issue of knowledge.

(continued on next page)

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Summation - Woodfield

1 When arrested Agent Maxwell took \$1000 out of the defendant's pocket, the same \$1000 that Agent Thornton had given Detective Giordano. We checked the serial numbers. You heard the evidence, and when confronted with this, the defendant then stated, "That's my gas money." That might possibly be believable if we didn't have the serial numbers. I submit to you it's highly unlikely that a gas station attendant would have \$1000. We know that's the money he used to sell those lenses; and also recall that Detective Giordano was arrested the same time, so at the time the defendant made that statement he thought Detective Giordano was not a detective, so he quickly evaluated the situation and thought, well, Detective Giordano if he keeps his mouth shut I could fake through this \$1000. I'll just say it's gas money. I submit to you that's a feasible, if a somewhat calculated attempt to exculpate himself at that time; but now we know, of course, the defendant lied, it wasn't true. He lied on that occasion. Are those repeated lies, the actions of an innocent man.

Now, later, of course, as Agent Thornton who at times Mr. Rosenberg would like to have you believe lied, but Agent Thornton got on the stand and told you, yes, later on the defendant told me he didn't

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Summation - Woodfield

know the goods were stolen. Wel, of course, Mr. Rosenberg would like you to believe Agent Thornton at that time but then not believe him on the other times, but you evaluate Agent Thornton's testimony and you make the determination. We'll consider if Agent Thornton was going to lie, would he have offered that statement? I submit to you, he wouldn't, but then again, even with that statement after the defendant knew the situation he was in, he was told by the agents that he had been arrested for possession of stolen goods, and he lied about the gas money. Before I told you to put yourself in Mr. Rosenberg's shoes, put yourself in the defendant's shoes, what is the next statement you're going to make, "I didn't know they were stolen." You take that statement for what it's worth. What would you expect them to say in that situation; and also, if he did make some statement to the agent as you heard from the evidence in this case, such as statements "I didn't know the goods were stolen." Did he say anything further? Did he tell the agents where he got the goods from? Do we hear where those goods came from, nothing. We don't know nothing, no one knows.

Now, the next statement the defendant made

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Summation - Woodfield

that came into evidence before you is that if the defendant knew that these goods were of a foreign nature and a federal offense he never would have touched it. "If I knew it was a federal offense I never would have touched it." Touch what, touch these stolen goods, obviously. Are those actions again of an innocent man.

Now, the last statement in response to a conversation that the agents had with the defendant concerning his cooperation. The defendant's answer is what. "If I cooperate my bones will be all over the airport." Why did he ever consider cooperation? What is he going to tell us? What does he know that we don't know? What does he know that he's not telling us? He not only knows the goods are stolen, he knows they are stolen from the airport, and I submit to you that he knows who stole them.

He stated that "We have access to 400 cameras." Please use your common sense in evaluating these statements and you determine whether or not they are the statements made by an innocent man or by a man who knew those goods were stolen; but as Mr. Rosenberg stated, quite the contrary, the Government is not relying on the bones all over the airport statement or

Summation - Woodfield

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2 the gas money statement. The Government is relying on
3 all the evidence that the Government presented to you,
4 and as I stated in my opening, you have to evaluate
5 everything and use that with your common sense. Do
6 these events that occurred, are they the events of a
7 man who didn't know the goods were stolen or is it
8 clear beyond a reasonable doubt that this man knew
9 that those goods were stolen; Bernard Schifter, gas
10 station owner in Brooklyn selling over \$5000 worth of
11 cameras, goods to an undercover cop for \$1000, one-
12 fifth of their value in his gas station, in back of
13 his car, and tells the agent, tells the detective he
14 has access to the entire rest of the stolen load. I
15 submit to you that when you consider all the evidence
16 in this case, you will find the defendant guilty of
17 the crimes charged. Thank you.

18 THE COURT: All right, ladies and gentlemen,
19 we will take a five minute recess so you can stretch
20 your legs. Don't discuss the case.

21 (Whereupon a recess was had.)

22 (Continued on next page)

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Charge

(After recess.)

THE COURT: Now, ladies and gentlemen, it is my practice to read the charge or the law to you, that is to minimize the possibility of error and make sure that I do not mistake myself as to any aspect of the law that I want to get across to you. I realize it is harder for you to follow, it requires more attention on your part, I beg your indulgence in that respect and urge you to pay close attention to all that was said.

Now that you have heard the evidence and the argument, it becomes my duty to give the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law, so given to the facts that you find them in the evidence of the case.

You are not to single out one instruction alone as stating the law, but let us consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon

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Charge

any other view of the law than that given in the instruction of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case. You must not permit yourselves to be governed by sympathy, bias, prejudice, or any other considerations not founded on evidence and these instructions on the law.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts upon the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law as given in the instructions of the Court.

You have been chosen and sworn as the jurors in this case to try the issues of the facts presented by the allegations of the indictment and the denial made by the "Not Guilty" plea of the accused. You are to perform this duty without any bias or prejudice as to any party. Again, the law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and

reach a just verdict regardless of the consequences.

I am not going to send the exhibits which have been received in evidence with you as you retire for your deliberation. You are entitled, however, to see any and all of the exhibits as you consider your verdict. I suggest that you begin your deliberations and then if it would be helpful to you, you may ask for any or all of the exhibits simply by sending a note to me through the Deputy Marshal.

As I said at the outset of the trial, an indictment is only a form or method of accusing a defendant of a crime. It is not evidence of any kind against the accused.

There are two types of evidence from which a jury may properly find a defendant guilty of a crime. One is direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence, the proof of facts and circumstances which rationally imply the existence or non-existence of other facts because such other facts usually follow according to the common experience of mankind. Thus, the footprint of a man in the sand implied to Robinson Crusoe that there was another man with him on the desert island and indeed there was, the Man Friday. Thus on the one

Charge

hand you may have direct evidence of the issue and on the other hand you may have circumstantial evidence of the issue. The law does not hold that one type of evidence is necessary or of a better quality than the other. The law requires only that the Government prove its case beyond a reasonable doubt both on direct and circumstantial evidence. At times the jury might feel that circumstantial evidence is of better quality. At other times they may feel direct evidence is of a better quality. That judgment is left entirely to you.

As a general rule, the law makes no distinction between direct and circumstantial evidence, it simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt. Doubt from all the evidence in the case.

The law presumes the defendant be innocent of crime. Thus, a defendant, although accused, begins the trial with a "clean slate" with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a

Charge

reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon the defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

A reasonable doubt does not mean a doubt arbitrarily and capriciously asserted by a juror because of his or her reluctance to perform an unpleasant task. It does not mean a doubt arising from the natural sympathy which we all have for one another. It is not necessary for the Government to prove the guilt of a defendant beyond all possible doubt. Because if that were the rule, very few people would ever be convicted. But it is practically impossible for a person to be absolutely sure and convinced of any contraverted fact which, by its nature, is not susceptible of mathematical certainty. In consequence, the law says that a doubt should be reasonable doubt, not a possible doubt.

A reasonable doubt is a doubt based upon reason and common sense, the kind of doubt that would make a

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Charge

reasonable person hesitate to act. Proof beyond a reasonable doubt must therefore be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own fears.

The jury will remember that a defendant is never to be convicted on their suspicion or conjecture.

Again, a reasonable doubt means a doubt sufficient to cause a prudent person to hesitate to act in the most important affairs of his or her life.

And now, it is charged in Count 1 of the indictment that on or about the 20th day of September, 1974, within the Eastern District of New York, the defendant Bernard Schifter did knowingly, willfully and unlawfully received and transported approximately 23 hexanon camera lenses and various quantities of other camera accessories, including, but not limited to, approximately 100 magnifiers, 28 46 millimeter chronacamera filters and 50 67 millimeter chronacamera filters, all of which lenses and camera accessories had theretofore been unlawfully removed from the American Airlines air cargo warehouse at Building 123, John F. Kennedy International Airport, where they were under the custody and control of the United States

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Charge

Customs service, the defendant Bernard Schifter knowing said merchandise to be unlawfully removed in violation of Section 549 of Title 18, United States Code.

Now, Section 549 of Title 18, United States Code, alleged to have been violated reads impertinent part as follows:

"Whoever, maliciously enters any bonded warehouse containing bonded merchandise with intent unlawfully to remove therefrom any merchandise or baggage therein, or unlawfully removes any merchandise or baggage in such bonded warehouse or otherwise in Customs custody or control; or

Whoever receives or transfers any merchandise or baggage unlawfully removed from any such warehouse, knowing the same to have been unlawfully removed" shall be in violation of the law.

The essential elements of the crime charged which must be proven beyond a reasonable doubt are as follows:

- 1) That the defendant received or transported merchandise;
- 2) That such receipt or transportation was done knowingly and intentionally;
- 3) That such merchandise had been unlawfully

Charge

removed from a bonded warehouse or otherwise in Customs custody or control;

4) That the defendant knew that such merchandise had been unlawfully removed.

Count 2 charges that on or about the 20th day of September 1974, within the Eastern District of New York, the defendant Bernard Schifter did knowingly, willfully and unlawfully have in his possession approximately 23 hexanon camera lenses and various quantities of other camera accessories, including, but not limited to approximately 100 magnifiers, 28 46 millimeter konica camera filters and 50 67 millimeter konica camera filters having a value in excess of \$100, which goods had been stolen from the American Airlines air cargo warehouse at Building 123, John F. Kennedy International Airport, while moving as and constituting part of a foreign shipment of freight from Japan to Woodside, New York, the defendant Bernard Schifter knowing the same to have been stolen in violation of Title 18, United States Code Section 659.

Section 659 of Title 18, United States Code, alleged to have been violated reads in pertinent part as follows:

"Whoever embezzles, steals or unlawfully takes,

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carries away, or by fraud or deception obtains from any storage facility or from any aircraft terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or a foreign shipment of freight, express or other property; or

"Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen"

shall be in violation of the law.

The essential elements of the crime charged which must be proven beyond a reasonable doubt are as follows:

1) That the defendant had in his possession merchandise;

2) That such merchandise exceeded in value \$100;

3) That such possession was done knowingly and intentionally;

4) That such merchandise had been embezzled, stolen or unlawfully taken or carried away from goods or chattels moving as or which were part of or which constitute an interstate or foreign shipment of freight,

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express or other property;

5) That the defendant knew such merchandise to have been embezzled or stolen.

With respect to both counts of the indictment, it is not necessary that defendant knew the merchandise had been removed from a bonded warehouse or that the merchandise had been taken from goods or chattels which were moving as a part of an interstate shipment. It is necessary only that the defendant knew as to Count 1, that the merchandise had been unlawfully removed, and as to Count 2, that the merchandise had been embezzled or stolen.

It is not necessary for the Government to prove who unlawfully removed the merchandise or who embezzled or stole the same or how it was removed or stolen.

(Continued on next page)

1
2 With respect to the question of possession,
3 the law recognizes two kinds of possession. A person
4 who knowingly has direct physical control over a
5 thing at a given time, is then in actual possession of
6 it.

7 A person who, although not in actual possession,
8 knowingly has both the power and the intention at a
9 given time to exercise dominion or control over a
10 thing, either directly or through another person or
11 persons is then in constructive possession of it.

12 The law recognizes that possession may be sole
13 or joint. If person alone has actual or constructive
14 possession of a thing, possession is sole. If two
15 or more persons share actual or constructive possession
16 of a thing, possession is joint.

17 Possession of property recently, unlawfully
18 removed or stolen, if not satisfactorily explained,
19 is ordinarily a circumstance from which the jury may
20 reasonably, but it is not required to draw the inference
21 and find, in the light of surrounding circumstances,
22 shown by the evidence in the case, that the person
23 in possession knew the property had been unlawfully
24 removed or stolen.

25 Ordinarily, the same inferences may reasonably

1
2 be drawn from a false explanation of possession of
3 recently unlawfully removed or stolen property.

4 The term "recently," is a relative term, and
5 has no fixed meaning. Whether the property may be
6 considered as recently stolen depends upon the nature
7 of the property, and all the facts and circumstances
8 shown by the evidence in the case.

9 If you find beyond a reasonable doubt from
10 the evidence in the case that the merchandise described
11 in the indictment was unlawfully removed from a
12 bonded warehouse as alleged in Count One, or that the
13 merchandise described in the indictment was embezzled
14 or stolen from goods or chattels which constituted
15 interstate commerce, as alleged in Count Two or both,
16 and that recently removed or stolen property was in
17 the possession of the accused, you may, but need not,
18 from these facts, draw the inference that the merchan-
19 dise was received or in the possession of the accused,
20 as the case may be, with the knowledge that the
21 merchandise was unlawfully removed or stolen unless
22 possession of the recently removed or stolen property
23 by the accused is explained to the satisfaction of
24 the jury by other facts and evidence in the case.

25 It is the exclusive province of the jury to

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determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits you to draw from possession of recently stolen property.

One of the elements of the crime charged in each count of the indictment, is that the defendant knew that the merchandise he possessed was unlawfully removed, as alleged in Count One or embezzled or stolen, as alleged in Count Two. As I have already instructed you, that must be proven beyond a reasonable doubt.

Knowledge is something that you cannot see with the eye or touch with the finger. It is seldom possible to prove it by direct evidence. The Government relies largely upon circumstantial evidence in this case to establish knowledge.

In deciding whether this defendant knew the merchandise was unlawfully removed or stolen or both, as the case may be, you should consider all the circumstances, such as how the defendant handled the transaction, how he conducted himself, et cetera. Do his actions betray guilty knowledge that he was dealing with stolen merchandise, or are his actions those of an innocent man?

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1
2 Guilty knowledge cannot be established by
3 demonstrating merely negligence or even foolishness
4 on the part of the defendant.

5 Knowledge that the goods may be stolen may
6 be inferred from the circumstances that would convince
7 a man of ordinary intelligence that this is the fact.
8 The element of knowledge may be satisfied by proof
9 that a defendant deliberately closed his eyes to what
10 otherwise would have been obvious to him.

11 Thus, if you find that the defendant acted with
12 reckless disregard of whether the merchandise was
13 unlawfully removed or stolen, and with a conscious
14 purpose to avoid learning the truth, the requirements
15 of knowledge would be satisfied unless the defendant
16 actually believed they were not unlawfully removed
17 or stolen.

18 In this connection, you should scrutinize the
19 entire conduct of the defendant at or near the time
20 the offenses were alleged to have been committed.

21 An act is done knowingly if done voluntarily
22 and intentionally and not because of mistake or accident
23 or other innocent reason.

24 The purpose of adding the word "knowingly" was
25 to insure that no one would be convicted for an act

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done because of mistake, or accident or other innocent reason.

An act is then wilfully done voluntarily and intentionally, that is to say purposely and not by mistake or in good faith.

Knowledge and intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's knowledge and intent from the surrounding circumstances. You may consider any statement made and done or omitted by a defendant, and all other facts and circumstances in evidence which indicate his state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

I've said to you several times, statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as approved.

Unless you are otherwise instructed, the

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evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them, and all facts which may have been admitted or stipulated; and all facts and events which may have been judicially noticed; and all applicable presumptions stated in these instructions.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court must be entirely disregarded.

Evidence does include, however, what is brought out from witnesses on cross-examination as well as what is testified to on direct examination.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case and your verdict is to be based on the evidence only. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been

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proved, such reasonable inferences as you feel are justified in the light of experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

If a lawyer asks a witness a question which contains an assertion of fact, you may not consider the assertion of evidence of that fact. The lawyers' statements are not evidence.

Evidence relating to any statement, or act or omission, claimed to have been made or done by a defendant outside of court, and after a crime has been committed, should always be considered with caution and weighed with great care; and all such evidence should be disregarded entirely, unless the evidence in the case convinces the jury beyond a reasonable doubt that the statement or act or omission was knowingly made or done.

A statement or act or omission is "knowingly" made or done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

In determining whether a statement or act or

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2 omission claimed to have been made by a defendant
3 outside of court, and after a crime has been committed,
4 was knowingly made or done, the jury should consider
5 the age, sex, training, education, occupation, and
6 physical and mental condition of the defendant, and
7 his treatment while in custody or under interrogation,
8 as shown by the evidence in the case; and also all
9 other circumstances in evidence surrounding the making
10 of the statement or act or omission, including whether,
11 before the statement or act or omission was made or
12 done, the defendant knew or had been told and under-
13 stood that he was not obligated or required to make
14 or do the statement or act or omission claimed to have
15 been made or done by him; that any statement or act
16 or omission which he might make could be used against
17 him in court; that he was entitled to the assistance
18 of counsel before making any statement, either oral
19 or in writing, or before doing any act or omission;
20 and that if he was without money or means to retain
21 counsel of his own choice, an attorney would be
22 appointed to advise and represent him free of cost or
23 obligation.

24 If the evidence in the case does not convince
25 beyond a reasonable doubt that a confession was made

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1
2 voluntarily and intentionally, you should disregard
3 it entirely. On the other hand, if the evidence in
4 the case does show beyond a reasonable doubt that an
5 admission was in fact voluntarily and intentionally
6 made by a defendant, you may consider it as evidence
7 in the case against the defendant who voluntarily and
8 intentionally made the admission.

9 You as jurors are the sole judges of the credi-
10 bility of the witnesses and the weight their testimony
11 deserves.

12 You should carefully scrutinize all the testimony
13 given, the circumstances under which each witness has
14 testified, and every matter in evidence which tends
15 to show whether a witness is worthy of belief.
16 Consider each witnesses intelligence, motive and
17 state of mind, and demeanor and manner while on the
18 stand. Consider the witness' ability to observe the
19 matters as to which he has testified and whether he
20 impresses you as having an accurate recollection of
21 these matters. Consider also any relation each
22 witness may bear to either side of the case; the
23 manner in which each witness might be affected by the
24 verdict; and the extent to which, if at all, each
25 witness is either supported or contradicted by other

evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

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If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised and no inference of any kind may be drawn, from the failure of a defendant to testify.

The law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence.

It is the duty of the attorney on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. You should not show prejudice against an attorney or his client because the attorney has made objections.

Upon allowing testimony or other evidence to be introduced over the objection of an attorney, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such

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1
2 evidence. As stated before, the jurors are the sole
3 judges of the credibility of all witnesses and the
4 weight and effect of all evidence.

5 When the Court has sustained an objection to
6 a question addressed to a witness, the jury must
7 disregard the question entirely, and may draw no
8 inference from the wording of it, or speculate as to
9 what the witness would have said if he had been
10 permitted to answer any question.

11 The fact that the Court has asked one or more
12 questions of a witness for clarification or admissi-
13 bility of evidence is not to be taken by you in any
14 way as indicating the Court has any opinion as to
15 the guilt or innocence of the defendant in this case.
16 And you are to draw no such inference therefrom. As
17 heretofore indicated, the Court has no such opinion,
18 that determination is up to you and you alone, based
19 On all the facts of the case and the applicable law
20 in these instructions.

21 You are here to determine the guilt or innocence
22 of the accused from the evidence in the case. You
23 are not called upon to return a verdict as to the guilt
24 or innocence of any other person or persons. So, if
25 the evidence in the case convinces you beyond a

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reasonable doubt of the guilt of the accused, you should so find, even though you may believe one or more other persons are guilty. But if any reasonable doubt remains in your minds after impartial consideration of all the evidence in the case, it is your duty to find the accused not guilty.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agrees thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for himself but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of your opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times you are not partisans.

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1
2 You are judges, judges of the facts. Your sole
3 interest is to seek the truth from the evidence in the
4 case.

5 There is nothing peculiarly different in the
6 way a jury should consider the evidence in a criminal
7 case, from that in which reasonable persons treat
8 any question depending upon evidence presented to them.
9 You are expected to use your good sense, consider the
10 evidence in the case for only those purposes for which
11 it has been admitted and give it a reasonable and
12 fair construction, in the light of your common
13 knowledge of the natural tendencies and inclinations
14 of human beings, with respect to each of the two counts
15 of the indictment.

16 If the accused be proved guilty beyond a
17 reasonable doubt, say so. If not proved guilty, say
18 so.

19 If any reference by the Court or by counsel to
20 matters of evidence does not coincide with your own
21 recollection, it is your recollection which should
22 control during your deliberations.

23 The punishment provided by law for the offenses
24 charged in the indictment is a matter exclusively
25 within the province of the court, and should never

1
2 be considered by the jury in any way, in arriving at
3 an impartial verdict as to the guilt or innocence of
4 the accused.

5 Upon retiring to the jury room, number one juror,
6 the gentleman seated closest to me in the blue suit
7 in the first row will act as your Foreman; if he
8 elects not to do so, you will select another one. The
9 Foreman will be your spokesman here in court. If it
10 becomes necessary during your deliberations to communi-
11 cate with the Court, you may send a note by a Deputy
12 Marshal, signed by your Foreman or by one or more
13 members of the jury. No member of the jury should
14 ever attempt to communicate with the Court, that's me,
15 by any means other than by a signed writing, and the
16 Court will never communicate with any member of the
17 jury on any subject touching the merits of the case,
18 otherwise in writing or orally here in open court.

19 You will note from the oath about to be taken
20 by the Marshals that they too, as well as all other
21 persons, are forbidden to communicate in any way or
22 manner with any member of the jury on any subject
23 touching the merits of the case.

24 Bear in mind also that you are never to reveal
25 to any person, not even to the Court, how the jury

1
2 stands numerically or otherwise on the question of the
3 guilt or innocence of the accused until after you have
4 reached a unanimous verdict. If you were to reveal
5 how you stood before you reached the unanimous verdict,
6 the Court would be required to declare a mistrial, and
7 the whole case would have to be tried all over again;
8 a juror once did that. Please don't do that.

9 When you reach a unanimous verdict, write me
10 a note and say, "We have reached a verdict." Do not
11 write and tell me what that verdict is. That verdict
12 should be communicated in open court only. I'll read
13 it again.

14 Bear in mind also that you are never to reveal
15 to any person, not even to the Court, how the jury
16 stands numerically or otherwise on the question of
17 guilt or innocence of the accused, until after you
18 have reached a unanimous verdict.

19 Those are the instructions of the Court.

20 We will take a short recess. I'll have a brief
21 discussion with the attorneys and then I'll re-call
22 you. After that I'll discharge the Alternates and
23 then only you may begin your deliberations. I'll let
24 you go now to the jury room, while you are in there,
25 don't discuss any part of the case or any part of the

1 charge or anything else, just wait a few minutes.

2 (Whereupon, the jurors were excused.)

3 MR. WOODFIELD: I have no objection to your
4 charge.

5 MR. ROSENBERG: Your Honor, just in the area
6 of recent possession. I think that six weeks is
7 alleged from the time of the property being stolen
8 till the time that it was in his possession. This is
9 no longer in recent possession.

10 THE COURT: I left it up to them to determine.

11 MR. ROSENBERG: All right, I wasn't quite sure
12 what I heard.

13 THE COURT: Do you want me to read you that
14 portion again?

15 MR. ROSENBERG: Yes.

16 (Court rereading part of the charge to attorney.)

17 MR. WOODFIELD: I did some research. I have
18 three cases that range from one month to 15 months,
19 they all say --

20 THE COURT: If it's three years down the pike,
21 you might have an argument. Bring them back.

22 (Whereupon, the jurors re-entered the court-
23 room.)

24 (Whereupon, the Clerk swore in two Deputy
25 Marshals.)

#7

1 THE COURT: Now, alternate jurors, your time
2 has come, as they say. Unfortunately you are not
3 going to be able to participate in the decision of
4 this case. You do serve a very useful purpose,
5 whether you realize it or not. From time to time one
6 or more jurors gets ill and you have to take their
7 place and it's better to have it that way than to
8 start all over again every time that occurs, so
9 you go with the thanks of the Court for your services
10 to the community as well as the Court. It's just too
11 bad you can't participate in the final process. You
12 take your cards from the Clerk. Thank you very much,
13 ladies and gentlemen.

14 Now remaining jurors, you may discuss the
15 case.

16 (Whereupon jurors began deliberation at 11:37.)

17 THE COURT: If they haven't come back with a
18 verdict by 12:15 I think I'll have the marshal take
19 incoming orders from them, and I'll let you go to
20 lunch at 1:00, from 1:00 to 2:00. I think it takes
21 so long if I send them out for lunch, I think it may
22 just drag the case over until tomorrow. If they
23 are not back with a verdict by 5:00 I just as well
24 send them home.

25 (Whereupon the Court stood in recess.)

* * *

AFTERNOON SESSION

THE CLERK: Jury's note received as Court's Exhibit 1.

(Jury present.)

THE COURT: Ladies and gentlemen of the jury, I hope that I have not interrupted your lunch. My apologies.

Mr. Foreman, I have a note from you saying that you have reached a verdict. If you would, please rise and answer the questions of the Clerk.

THE CLERK: Mr. Foreman, how do you find the defendant as to Count 1, guilty or not guilty?

THE FOREMAN: Guilty.

THE CLERK: How do you find the defendant as to count 2, guilty or not guilty?

THE FOREMAN: Guilty.

THE CLERK: You say that you find the defendant Bernard Schifter, guilty as to both counts? And so say you all?

THE FOREMAN: Yes.

THE COURT: Do you wish the jury polled?

MR. ROSENBERG: Yes.

THE CLERK: Juror No. 1, is that your verdict?

JUROR NO. 1: Yes.

1 THE CLERK: Juror No. 2, is that your verdict?

2 JUROR NO. 2: Yes.

3 THE CLERK: Juror No. 3, is that your verdict?

4 JUROR NO. 3: Yes.

5 THE CLERK: Juror No. 4, is that your verdict?

6 JUROR NO. 4: Yes.

7 THE CLERK: Juror No. 5, is that your verdict?

8 JUROR NO. 5: Yes.

9 THE CLERK: Juror No. 6, is that your verdict?

10 JUROR NO. 6: Yes.

11 THE CLERK: Juror No. 7, is that your verdict?

12 JUROR NO. 7: Yes.

13 THE CLERK: Juror No. 8, is that your verdict?

14 JUROR NO. 8: Yes.

15 THE CLERK: Juror No. 9, is that your verdict?

16 JUROR NO. 9: Yes.

17 THE CLERK: Juror No. 10, is that your verdict?

18 JUROR NO. 10: Yes.

19 THE CLERK: Juror No. 11, is that your verdict?

20 JUROR NO. 11: Yes.

21 THE CLERK: Juror No. 12, is that your verdict?

22 JUROR NO. 12: Yes.

23 THE CLERK: And so say you all.

24 THE COURT: Ladies and gentlemen, I will let

25 you go back and finish your lunch. The Clerk will give

1
2 you the cards of the various jurors. When you have
3 finished your lunch, you should report back to the
4 Central Jury Room to check out for the day, and they
5 will give you such instructions as they wish. I do not
6 think they will require your further services today.
7 You may go with the thanks of the Court for the job you
8 have done and the thanks of your fellow citizens in the
9 community.

10 Thank you very much.

11 (Jury leaves courtroom.)

12 MR. WOODFIELD: Your Honor, the bail in this
13 case is presently \$5,000 personal recognizance bond.

14 The Government has no objection to continuing
15 that.

16 THE COURT: All right, bail will be continued.

17 MR. ROSENBERG: Thank you, sir.

18 THE COURT: Mr. Rosenberg, Mr. Schifter should
19 report to the Probation Department. I think you'd best
20 do it today, at least they will get started on it. It
21 will probably take six to seven weeks before the pre-
22 sentence report is written and you will be notified as
23 to when you have to return.

24 MR. ROSENBERG: What do you want to do about
25 motions? Do you want to reserve them?

1
2 THE COURT: Yes, until the time of sentence.

3 Do you have any objection to that?

4 MR. WOODFIELD: No, your Honor.

5 THE COURT: I will grant you leave to make your
6 motions on the date of sentence.

7 However, you should be assured on that date to
8 remind me when you are asked, if you want to say
9 anything, to renew your motions in the event that I
10 forget which I might. The burden is on you.

11 MR. WOODFIELD: The request I would make, if
12 anything is submitted, that it be submitted a few days
13 prior to the date of sentence, and I be provided with
14 a copy.

15 THE COURT: Yes, a week in advance.

16 MR. ROSENBERG: All right.

17 MR. WOODFIELD: Thank you.

18 MR. ROSENBERG: No definite date for sentence?

19 THE COURT: No, you will be notified when the
20 pre-sentence report is completed.

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22 * * *
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